

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs February 25, 2014

MARCUS JOHNSON v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Knox County
Nos. 100361 & 100369 Steven W. Sword, Judge**

No. E2013-01464-CCA-R3-PC - Filed March 20, 2014

The Petitioner, Marcus Johnson, appeals as of right from the Knox County Criminal Court's dismissal of his petition for post-conviction relief. The Petitioner contends that the post-conviction court erred by dismissing his petition as having been untimely filed. Discerning no error, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JAMES CURWOOD WITT, JR., J., joined.

J. Liddell Kirk, Knoxville, Tennessee, for the appellant, Marcus Johnson.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany Faughn, Assistant Attorney General; Randall Eugene Nichols, District Attorney General; and Philip H. Morton, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In April 2011, the Petitioner pled guilty to the sale of cocaine and received an agreed upon sentence of ten years to be served on probation. The trial court's judgment became final in May 2011. In December 2011, the trial court revoked the Petitioner's probation and ordered his sentence into execution. The Petitioner appealed the revocation, and this court affirmed the trial court's decision. See State v. Marcus Terrell Johnson, No. E2012-00015-CCA-R3-CD, 2012 WL 3651129 (Tenn. Crim. App. Aug. 27, 2012), perm. app. denied, (Tenn. Nov. 27, 2012).

In September 2012, the Petitioner filed a pro se petition for post-conviction relief alleging that his guilty plea was not knowingly and voluntarily entered into due to the

ineffective assistance of his trial counsel. The post-conviction court appointed counsel to represent the Petitioner in this matter, and an amended petition was filed. The post-conviction court then held a hearing to determine whether the petition was timely filed.

At the hearing, the Petitioner admitted that the petition was filed outside the one-year statute of limitations. However, the Petitioner argued that the appeal of his probation revocation should have tolled the statute of limitations. The Petitioner also argued that due process should prevent the dismissal of his petition because he was unaware that he had any viable post-conviction claims until after February 2012, when his trial counsel provided him with “his file” and the discovery materials relating to his case. The post-conviction court rejected the Petitioner’s arguments and dismissed the petition as having been untimely filed.

On appeal, the Petitioner concedes that the appeal of his probation revocation did not toll the statute of limitations. See William Thomas Umfleet v. State, No. M2003-00815-CCA-R3-PC, 2004 WL 2346149, at *1 (Tenn. Crim. App. Oct. 19, 2004) (citing Young v. State, 101 S.W.3d 430 (Tenn. Crim. App. 2002)). The Petitioner does contend that the statute of limitations should be tolled on due process grounds because he was unaware that he had any viable post-conviction claims until after February 2012 when he received his file from trial counsel. The State responds that the fact that the Petitioner was merely unaware that a claim existed did not amount to a due process violation which would justify tolling the statute of limitations.

Post-conviction relief is available when a “conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States.” Tenn. Code Ann. § 40-30-103. A petition for post-conviction relief must be filed “within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken or, if no appeal is taken, within one (1) year of the date on which the judgment became final” Tenn. Code Ann. § 40-30-102(a). “[T]he right to file a petition for post-conviction relief . . . shall be extinguished upon the expiration of the limitations period.” Id. “If it plainly appears from the face of the petition, any annexed exhibits or the prior proceedings in the case that the petition was not filed . . . within the time set forth in the statute of limitations, . . . the judge shall enter an order dismissing the petition.” Tenn. Code Ann. § 40-30-16(b).

The Post-Conviction Procedure Act provides three factual circumstances in which the statute of limitations may be tolled: (1) the claim is based upon a constitutional right “that was not recognized as existing at the time of trial, if retrospective application of that right is required”; (2) the claim is based upon “new scientific evidence” establishing the actual innocence of the petitioner; or (3) the claim seeks relief from a sentence that was enhanced based upon a previous conviction which was subsequently held to be invalid and the previous

conviction “was not a guilty plea with an agreed sentence.” Tenn. Code Ann. § 40-30-102(b). There is nothing in the record to suggest that any of these exceptions apply to the Petitioner’s case.

In addition to the statutory circumstances listed above, our supreme court has held that due process may require tolling the statute of limitations based upon the conduct of a petitioner’s lawyer, for example, in situations where an attorney has abandoned the petitioner or actively lied or mislead the petitioner regarding his case. Whitehead v. State, 402 S.W.3d 615, 631 (Tenn. 2013). To succeed upon such a claim, a petitioner must show “(1) that he or she had been pursuing his or her rights diligently, and (2) that some extraordinary circumstance stood in his or her way and prevented timely filing.” Id.

Here, there is no evidence that trial counsel abandoned the Petitioner or actively lied or mislead him regarding his case. Trial counsel provided the Petitioner with his file in February 2012, some three months before the expiration of the statute of limitations. The Petitioner claims that he did not have time to properly review the file. This court has repeatedly held that a petitioner’s ignorance of post-conviction procedures and “mere lack of knowledge that a claim exists” does not constitute a due process violation which would toll the statute of limitations. Joshua Jacobs v. State, No. M2009-02265-CCA-R3-PC, 2010 WL 3582493, at *3 (Tenn. Crim. App. Sept. 15, 2010), perm. app. denied, (Tenn. Jan. 20, 2011). Accordingly, we conclude that the post-conviction court did not err in dismissing the Petitioner’s petition as untimely filed.

Upon consideration of the foregoing and the record as a whole, the judgment of the post-conviction court is affirmed.

D. KELLY THOMAS, JR., JUDGE